23rd August, 1988.

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88/27

Royal Court (Inferior Number)

23 AUG 1988

Before: Mr. V.A. Tomes, Deputy Bailiff
Jurat M.G. Lucas
Jurat C.L. Gruchy

Between	H.M. Attorney General	Plaintiff
And	Mr. George Roger de Carteret	"Adjoint"
And	Mr. Winter Poignand Le Marquand	Defendant

H.M. Attorney General in person
Advocate R.A. Falle for "Adjoint"
Advocate B.I. Le Marquand for Defendant

On Friday, the 8th July, 1988, Mr. Wayne Philip Le Marquand, the agent of the defendant, was about to demolish, with the aid of a "J.C.B." digging machine, a piece of land variously called a bank, a "nib" or a "spur", allegedly forming part of certain field called "La Petite Montagne" and allegedly in the possession of the "adjoint", situate at Mont Fallu, in the Parish of St. Peter, when the "adjoint" made the "Clameur de Haro" in order to halt the work and impose an immediate injunction to restrain the said Mr. Le Marquand from proceeding with the work.

The matter came before the Court on Friday, 15th July, 1988, when the Court allowed an intervention by the defendant who thus assumed responsibility for the act complained of and was substituted for Mr. Wayne Philip Le Marquand as defendant (see Vatcher et au. adjoints v. Burgess et au., Pike intervenant (1885) 210 Ex.15).

Mr. Falle outlined the facts leading to the raising of the "Clameur". Advocate M.J. Backhurst, who appeared for the defendant at that sitting, conceded that the "Clameur" had not been raised either frivolously or vexatiously in the sense that the "adjoint" believed that he was in possession of the land in question and had acted in good faith; however, he did not concede that the "Clameur" had been properly raised in that the claim to possession was

not admitted; it was contended by the defendant that he had possession of the land in question.

Both the Attorney General and Mr. Backhurst advised the Court that the proper way to proceed would be to request the Viscount to attend on site (a Vue de Vicomte), to examine the area and hear witnesses and then to prepare a report for consideration by the Court. Mr. Falle submitted that 'possession' is a simple matter of fact and that it would be better if evidence were heard before the Court.

The Court accepted that the large majority of authorities indicated that the course to be adopted in cases such as this was to instruct the Viscount to attend on site in order to view and to hear the submissions of the parties and then to report to the Court. However, subject to Rules of Court the Court remains the master of its own procedure. The notes of ancient practitioners, handed down from generation to generation, had a value in cases of this kind and indicated that the Court had a discretion, depending on the circumstances of the case, either to instruct the Viscount to attend on site or to send the action 'en preuve' and hear evidence itself. C.S. Le Gros, in his "Traité du Droit Coutumier de l'Ile de Jersey", at p.30, says that the Court orders the Viscount to attend on site "lorsqu'elle le croit nécessaire pour l'éclaircissement de la cause". We decided that, in the circumstances of this particular case, no useful purpose would be served by instructing the Viscount to attend on site but that, possession being an issue of fact to be decided, it would be preferable for the Court itself to hear the evidence of the parties and their witnesses.

The question also arose as to the kind of possession that was in issue. Mr. Backhurst argued that whilst the "Clameur" relates to possession, it would not be possible in this particular case to decide the issue of possession until the question of ownership was resolved. Mr. Falle argued that the action pursuant to the raising of a "Clameur" is an "action possessoire" requiring possession by the "adjoint" for a year and a day and no more. The Attorney General agreed that what was in issue was possession only.

The Court sent the issue of fact 'en preuve'; in the meantime the "Clameur" was not lifted and the injunction thus obtained by the "adjoint" remained in force; the Court fixed the 2nd August, 1988, for the further hearing; but having regard to the decision of the Court in Pinel v. Comité de Surveillance des Grandes Routes (1901) 221 Ex 199, the parties would be at liberty to make further submissions to the Court as to whether it was simple possession or proprietary possession that was in issue.

On the 2nd August, the Court heard legal argument on the issue of the type of possession involved; we were grateful to the Attorney General, in particular, for his submissions of law; at the conclusion of the legal arguments we gave our decision to the effect that the "Clameur de Haro" is an "action possessoire" and that at this summary stage the Court should not concern itself with the "pétitoire" or title. We said that we would give our reasons in writing later, which we now proceed to do.

Pinel ajoint v. Comité de Surveillance des Grandes Routes (1901) 221 Ex 54 is reported in the "Table des Décisions de la Cour Royale" (1901-1907) at page 36 under "Clameur de Haro" as follows:-

"Clameur frivole - ajoint condamné à l'amende de Clameur de Haro frivole, et vu les circonstances de la cause , à la moitié des frais seulement".

However, at page 6 of the same volume, under "Actions - Droit d'Action" the separate and subsequent action of Pinel v. Comité de Surveillance des Grandes Routes (supra) is reported as follows:-

"Clameur de Haro - Possession propriétaire - On est sans droit de lever la Clameur de Haro, à moins d'être en possession propriétaire du terrain en litige".

The Act of the Court relating to the first of the two actions adds nothing to the note in the "Table des Décisions".

The second action appears to have turned on the issue of "chose jugée" and the relevant part of the judgment reads as follows:-

"Considérant que le jugement de la Cour Royale du 16 Février 1901 ne constitue chose jugée entre le parties que quant au mode d'action auquel l'acteur y avait à tort eu recours n'étant pas en possession propriétaire du terrain en litige, mais n'exclut nullement le droit de l'acteur de recourir à la Justice si, comme il le prétend, il a été sans droit troublé à raison des mêmes actes de la part du défendeur dans sa possession et jouissance de fait dudit terrain et de ce qui s'y trouvait....."

Superficially at least, the Pinel case would appear to require proprietary possession as opposed to simple possession; and, therefore, title would be relevant. We had therefore to consider all the other authorities available to us.

Le Gros, in his "Traité du Droit Coutumier de l'Ile de Jersey", to which we have referred already, deals fully with this question in his chapter "De la Clameur de Haro" p.28, at pages 29-30, and says this:-

"Au 12e siècle, dans les cas de dépossession le justiciable avait recours au bref de nouvelle dessaisine qui était mis en mouvement dans l'an et jour de la dessaisine ou dépossession. Comme la procédure de ce bref ne donnait pas un remède immédiat, on étendit la clameur aux cas possessoires qui donnait à la partie qui se prétendait lésée le droit de faire cesser sur-le-champ l'entreprise ou trouble de fait du soi-disant usurpateur. Celui qui était troublé dans sa jouissance avait donc à sa disposition un moyen rapide de faire cesser le prétendu tort ou dommage en mettant immédiatement en branle cette action mixte et possessoire. Ce recours suprême au duc subsiste encore à Jersey. La clameur est donc un moyen puissant et énergique qui protège le possesseur contre les entreprises injustes.

"Le plaideur qui a été condamné à l'amende de la clameur et qui prétend avoir titre valable à la propriété de l'héritage a le droit d'intenter une action au pétitoire. Ces actions en revendication de la propriété intentées après

vuidance de l'action possessoire sont très rares à Jersey. Les preuves et évidences du propriétaire ou soi-disant propriétaire de l'héritage qui a poussé le cri de Haro et celles de la partie adverse qui sont produites en Cour établissent souvent à qui le droit de propriété appartient quoique la Cour ne soit appelée à se prononcer que sur la question de la possession."

Le Gros also cites Terrien who in turn cites an Ordinance of Charles VIII 1494 under the title of "D'Actions, Querrelles ou Clameurs" Book 8, which requires a separation of the "pétitoire" and "possessoire". Terrien adds:

"Et semble ceste ordonnance estre fondée en meilleur raison en matière de Haro, pource qu'en ce cas celui qui voudroit conduire le pétitoire, seroit contraire à luy-mesme : entant que par le Haro il se dit possesseur : et en intentant le pétitoire il renonceroit à sa possession."

And at page 35 Le Gros says this:-

"En définitive, le haro demeure en principe une procédure rapide qui permet d'arrêter immédiatement et sans le secours d'aucun officier de justice le trouble de possession dont nous avons parlé."

Le Geyt's "Lois et Coustumes de Jersey" at page 37 Titre VIII, entitled "Du Possessoire" at Article 2, reads as follows:-

"S'il arrive quelque trouble en la possession, on doit, pour s'y maintenir, interjetter sur le Champ la Clameur de Haro contre le 'Turbateur'...."

And at Article 4:-

"En Droits casuels, comme Reliefs, Jurisdictions, Patronage, Varech, & ca., celuy qui a paisiblement joui le dernier est reputé possesseur."

And at Article 6:-

"Si les parties pretendent estre toutes deux en possession d'un fonds, on les appointe respectivement en preuve, & si la dernière année elles ont, l'une et l'autre, fait des actes possessoires, on examine la possession de l'an precédent, & d'an en an depuis dix ans, sans esgard au titre, si ce n'est pour eclaircir la possession."

Hemery and Dumaresq in their "Statement of the mode of proceeding, and of going to trial in the Royal Court of Jersey, in all causes, criminal, civil and mixed" (1789), at page 32, say that:-

"It must be observed, that the Clameur de Haro is made use of in this Island, against attempts on the possessions of real property only...."

We refer also to Pissard's "La Clameur de Haro dans le Droit Normand" (1911) - Chapter VI "La Clameur de Haro en matière civile", p.93:-

"Mais, dès le XIIIe siècle, cette institution se développe dans le domaine du possessoire, où elle acquiert une place de plus en plus large...."

And at page 95:-

"Aussi, sans doute vers le milieu du XIIIe siècle, il (le bref de nouvelle dessaisine) fut complété par un nouveau développement du haro qui permit d'arrêter sur-le-champ toute atteinte portée à la possession...."

Without citing further extracts we can say that the whole of the chapter supports the opinion that the "Clameur" which developed in civil cases, relates solely to possession and not to "pétitoire" or title.

Moreover, in his 2nd Part, Chapter 1 "Champ d'application de la Clameur de Haro", at page 113, Pissard says that:

"On se bornera à condamner à une amende celui qui sera reconnu n'avoir pas droit à la possession."

And at page 115:-

"On ne peut donc guère parler de conflit possessoire que lorsqu'un immeuble est en cause, et c'est seulement alors que les juristes étudient concurremment la clameur de haro et le bref de nouvelle dessaisine, en les opposant aux actions pétitoires.

"Pour user soit du haro, soit du bref de nouvelle dessaisine, la possession requise est la même, et il faut en avoir joui pendant un an et un jour...."

And at page 116:-

"Seulement il fallait qu'il s'agisse bien de la possession et non pas de la propriété pour que le haro puisse être employé : Un arrêt du 19 mai 1531 décida que lorsque deux clercs présentés se disputaient la possession d'un bénéfice, ils ne pouvaient pas mettre en question ce qui concernait les droits de patronage et de présentation, car ceux-ci intéressaient la propriété du bénéfice et non pas sa possession."

In Chapter 2 "La Procédure de la Clameur de Haro" p.120, Pissard, at page 128, says this:-

"Pour triompher, il fallait démontrer qu'on avait possédé pendant la dernière année, et on pouvait employer tous les moyens de preuve qu'on jugeait efficaces : D'après le Style de 1515, "la récréance se adjuge à celuy qui a droit commun pour lui, promptes preuves du tietre le plus aparent." D'après d'Aviron, "il suffit d'alléguer titres, c'est-à-dire cause de posséder, et prouver la possession paisible es dernières années, et principalement à la dernière recueilte : car celuy obtient, qui a possédé paisiblement la dernière année par an et par jour." Il importait cependant de simplifier et d'abréger autant que possible la procédure, d'autant que le jugement sur le possessoire est ordinairement suivi d'une nouvelle instance concernant le pétitoire."

The Court was satisfied that the overwhelming weight of authority was that the action pursuant to the raising of a "Clameur de Haro" is an "action possessoire". It is to be compared with an action in "nouvelle dessaisine" and contrasted from an action "pour exhiber titres" which is an "action pétitoire".

We agree with the Attorney General that it is the headnote of the Attorney General and Pinel v. Falle case in the "Table des Décisions" that caused the difficulty which we faced in this case and was an inaccurate representation of that which the Court decided. In the second action the Court was concerned with "chose jugée" and not with an interpretation of the "Clameur" - thus, the statement that the "Clameur" required "possession propriétaire" on the part of the person raising it was 'obiter'. The statement runs counter to all the authorities we have cited and we were not prepared to follow it.

The Clameur de Haro is a matter of summary procedure; the test is to decide who was in possession during the year and a day preceding the declaration; of course, in order to do so, the Court can have regard to acts of possession in earlier years and even to title; but this Court adopted the statement of d'Aviron : it is sufficient to allege title and to prove possession.

Accordingly, the Court proceeded to hear evidence on the issue of possession.

Addendum: After evidence had been heard from the 'adjoint', both in chief and in cross-examination, the Court granted an adjournment and the parties attended on site in an effort to negotiate a settlement of their differences. When the Court reconvened, it was informed that a settlement had been reached on all matters of difference (the substantive issues) between the parties, including the question of costs 'inter partes'. The terms of the settlement were embodied in a letter from Counsel for the 'adjoint' to Counsel

for the defendant. The defendant, through his Counsel, gave his solemn undertaking to abide by the terms of the settlement. Any breach of the terms of settlement, other than by a variation reached by agreement 'inter partes' would constitute a contempt of Court. The terms of the settlement were to be embodied in a deed of arrangement (contrat de transaction) to be passed before the Court.

The defendant then conceded that the "Clameur" had been properly and regularly made (interjetée à bon droit). The Court agreed with the Attorney General that this had been a clasic example of the "Clameur" and, in accordance with his conclusions and in the discretion of the Court under Rule 7/4(1) of the Royal Court Rules, 1982, ordered that the defendant pay the sum of Ten Pounds by way of a fine (par voie d'amende de Clameur de Haro) and the sum of Five hundred Pounds by way of costs incurred by the 'Partie Publique'.

Authorities

Vatcher et autres, adjoints, -v- Burgess et autre; Pike intervenant (1885) 210 Ex 15.

C.S. Le Gros: "Traité du Droit Coutumier de l'Ile de Jersey": De la Clameur de Haro"; "Des Actes de la Cour Royale et de Quelques Règles de Droit et de Procédure" p.411 at p.p. 417 and 418.

Pinel -v- Comité de Surveillance des Grandes Routes (1901) 221 Ex 199.

Pinel -v- Comité de Surveillance des Grandes Routes (1901) 54.

Le Geyt: Lois et Coutumes de Jersey: Titre VIII Du Possessoire
Titre IX Du Pétitoire.

Hemery and Dumaresq: "Statement of the mode of proceeding and of going to Trial in the Royal Court of Jersey, in all causes, Criminal, Civil, and mixed" (1789): p.p. 5-7, 11-12, 18, 30-32.

Pissard: "La Clameur de Haro dans le Droit Normand" (1911): Chapter 6: La Clameur en matière civile: p.93-; Part 2, Chapter 1: Champ d'application de la Clameur de Haro: p.107-; Chapter 2: La Procédure de la Clameur de Haro: p.120-.

Royal Court Rules, 1982: Rule 7/4 (1).

Minutes of Evidence, taken before the Commissioners, appointed to inquire into the civil, municipal, and ecclesiastical laws of the Island of Jersey: (1860) p.p. 128, 172, 173.

The Attorney General and Bailhache (Adjointe) -v- Williams (née Lewis) (1968) JJ 991.

Simon (née Blades) -v- Baudains (née Lemmens) and Baudains (1970) JJ 1405.

Baudains (née Lemmens) & Baudains -v- Simon (née Blades) (1971) JJ 1949 C of A.

Houard: Dictionnaire Analytique, Historique de la Coutume de Normandie (Rouen, 1781): "Possessoire".

Attorney General & Hamel (Adjoint) -v- Falle (1968) 257 Ex 223.

Attorney General & Luce (née Rault) -v- Petty (1974) 258 Ex 344.

Poingdestre on Article 195 of the Coutume Réformé.